United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

72

BRIEF OF APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 24,228

In re:
Estate of Selma Munter Borchardt,
Deceased

Louis Camera, Executor
v.
Selma Munter Lobsenz Berliner,
Appellant

David G. Rivenes

Appeal from the United States District Court for the District of Columbia

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TABLE OF CITATIONS

CASES:

* Cases and authorities marked with asterisks are chiefly relied upon.

OTHER AUTHORITIES:

* Cases and authorities marked with asterisks are chiefly relied upon.

STATEMENT OF QUESTIONS PRESENTED

Whether the District Court erred: (1) by setting aside its earlier order which held that the testamentary trust herein had failed and the designated cestui que trust "Custer County Society For the Preservation of Local Folklore, Legend, History and Tradition" was not in being; and (2) instead, on "Reconsideration" holding, in the order appealed from, that it now will "validate the trust" by invoking cy pres and vesting title to the corpus in Barn Players, Inc., a private social club "for members," as against the heirs-at-law of decedent.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,228

Estate of SELMA MUNTER BORCHARDT, Deceased.

Appeal from the United States District Court for the District of Columbia

---

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Selma Munter Lobsenz Berliner in her own behalf and as the duly appointed committee of her incompetent sister, Margaret Lobsenz, being the heirs at law of Selma Munter Borchardt, deceased, from an order herein of United States District Court Judge Matthew F.

McGuire, holding Probate Court dated January 13, 1970, modifying an earlier order herein of December 4, 1969. This is the first time this case has come before this Court.

REFERENCES TO RULINGS

"Memorandum and Order"

Entered in District Court on January 13, 1970:

> "Addendum information supplied by the nominated trustee under the will of the testatrix, in his motion for Reconsideration of the Court's Memorandum and Order dated December 4, 1969, seeks to validate the trust through the application of the *cy pres* doctrine. The Court concurs.
>
> "It is found that, though no organization has been created bearing the specific title designated by the testatrix, her intent and purpose can be realized through the functioning of Barn Players, Inc., a non-profit corporation organized under the laws of the State of Montana; and more specifically, through the functioning of a subsidiary of said corporation, such subsidiary specifically as stated 'being organized for the purpose of accomplishing the objectives set out by Miss Borchardt.'
>
> "The Court therefore now concludes that the personalty made subject to Paragraph 7 of the testamentary disposition of the testatrix now vests in the above-mentioned corporation, viz., Barn Players, Inc.
>
> "With reference to Paragraph 9, the Court adheres to its initial conclusion. The resignation of one of the executors is of no moment."

(Joint Appendix (App.), page 63)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Probate Adm. No. 480-68

Estate of: SELMA MUNTER BORCHARDT, Deceased.

Memorandum and Order

In response to request by the Executor for instructions as to construction of certain paragraphs of the testamentary disposition of one Selma Munter Borchardt filed March 28, 1968 and admitted to probate May 21, 1969, the Executor is advised that *with respect to Paragraph* 7, the ostensible trust created therein falls for the want of a *cestui que* trust and so, therefore, the personalty in question falls into the residue. This is the more so evident because the testamentary disposition was dated December 9, 1964, and as stated above, admitted to probate in 1969, and as of this date there is no such Society as the "Custer County Society for the Preservation of Local Folklore, Legend, History, and Tradition," the ostensible beneficiary in being, nor does there appear in the reasonable future that such a Society will become so.

With reference to Paragraph 9, the Court concludes that the category of "friends" is sufficiently designated and not vague in the circumstances, and in addition to that, the intent of the testatrix is complied with, since discretion is vested in the Executor.

This memorandum may be treated as an Order in the circumstances.

/s/ MATTHEW F. MCGUIRE
Matthew F. McGuire, United
States District Judge

December 4, 1969

(App. 25)

STATEMENT OF CASE

The parties submit to the Court an "Agreed Statement of the Case in Lieu of the Record on Appeal." (App. 7)

These are the salient facts:

Decedent, Selma Munter Borchardt died January 30, 1968, at the age of 72 years, after at least a five year illness, of "arteriosclerosis general." (Exhibit B). (App. 19)

She never married. She left a Will, which was admitted to probate on May 21, 1969. Her gross estate is about $37,000., and her net residuary estate, after payment of all debts, a few specific bequests, taxes and administration costs, is estimated to be approximately $15,000. Her closest surviving next-of-kin are cousins of the first degree, the appellant and her unmarried, incompetent sister, Margaret Lobsenz, for whom she is the duly appointed committee, by an Order of the Supreme Court of New York, dated February 3, 1967. (App. 8, 47-48)

In October, 1969, the Executor, Louis Camera, under Miss Borchardt's Will, served a "Petition for Instructions" (Exhibit C), upon the attorney for David Rivenes, named as the Trustee in Paragraphs "Seventh" and "Eleventh" of decedent's will. Mr. Rivenes had demanded from the Executor that he turn over to him certain specific pieces of furniture at once, even before the trust naming him was found valid. The Executor refused to do this without instructions from the Court. (App. 20-21)

The paragraphs of the Will specifically at issue as far as appellant is concerned, are Paragraphs "Seventh" and "Eleventh" as follows:

> "*Seventh:* I direct that the furniture listed in the attached sheet be held in trust by David Rivenes of Miles City until the Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition (hereinafter called the Society), has been established and is ready to start on the program of restoration of the county seat, with the reservation that

during my lifetime, a life interest will remain vested in me."

"*Eleventh:* I direct that the sum realized from the sale of 1741 Park Road, N.W., together with the rest, residue and remainder of my estate, including monies on deposit with Perpetual Building Association, and the proceeds from my retirement fund, be held in trust by David Rivenes until the Society has been established and is ready to start on the development of the program for the restoration of the County seat as it was approximately in the early days of its history." (App. 17-18)

It should be noted in passing that "no list of furniture," mentioned in "Seventh" was, in fact, attached "to the Will."

On December 4, 1969, after argument on the Executor's motion, a "Memorandum and Order" was entered in the United States District Court for the District of Columbia (Exhibit E) in which the Court held in part:

". . . the Executor is advised that with respect to Paragraph 7, the ostensible trust created therein falls for the want of a *cestui que trust* and so, therefore, the personalty in question falls into the residue. This is the more so evident because the testamentary disposition was dated December 9, 1964 and as stated above, admitted to probate in 1969, and as of this date there is no such Society as the 'Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition,' the ostensible beneficiary in being, nor does there appear in the reasonable future that such a Society will become so." (App. 25)

Appellant takes no position on "Paragraph Ninth" of the Will, and therefore, makes no comment on that part of the order.

Appellant was not made a party to the proceedings resulting in the Court's order of December 4, 1969. Subsequently, however, on or about December 12, 1969, counsel for David Rivenes filed a "Motion For Reconsideration

Or In The Alternative For Clarification" of the Court's said order (Exhibit F), and served the moving papers both upon counsel for the Executor and upon counsel for Appellant, and Appellant thereafter participated fully in the proceeding.

Rivenes' petition seeks to avoid the effect of the Court's decision of December 4, 1969 to the effect that "the Custer County Society For The Preservation of Local Folklore, Legend, History and Tradition (hereinafter called the Society)", the named cestui que trust in decedent's Will, was not in existence. He seeks to do this in an allegation in paragraph "4" of his petition to the effect:

> "Mr. Rivenes failed to bring to the Court's attention the fact that the Society is now, in fact and in law, in existence and has been in existence since before testatrix' death." (App. 27)

and in "5" prays the Court to order the distribution of the trust fund to the Society.

He does not ask the court to apply the cy pres doctrine at all. He does not mention cy pres anywhere in his petition. He rests his case on the alleged actual existence and being of the Society mentioned in the Will.

Apparently, the Court was not convinced that this was the case, for the Court did not alter its order as requested by Rivenes in paragraph "5" of his petition and give the property to the 'Society.' Instead, in the January 13th, 1970 order, entered after reconsideration, the Court stated:

> "It is found that . . . no organization has been created bearing the specific title designated by the testatrix."

The Court itself then invoked the cy pres doctrine and vested the gift in Barn Players, Inc., with the statement in the order:

> "her intent and purpose can be realized through the functioning of Barn Players, Inc."

The Court's error in applying cy pres to the facts here is analyzed in the detailed consideration in Point I following. The Court apparently arrived at this result as stated in its order of January 13th, 1970 by giving full credence to "Addendum information supplied by the nominated trustee under the Will." This information, consisting largely of uncorroborated conversations by Rivenes with the deceased, incorporated into the so-called minutes of the "subsidiary," is inadmissible, for it is hearsay and specifically excluded under D.C. Code 14-302 (1967). The Court should not have considered it at all. (App. 27-45)

But since the Court below, even if erroneously, did allow this material in the record, it becomes necessary to consider it now.

The "Addendum information" annexed to Rivenes' petition mentioned in the order of January 13, 1970, shows Barn Players, Inc. to be organized for social, recreational and cultural purposes "for members" of the group. It has no purpose at all to "restore" anything—the county seat, the old home or otherwise. It is fair to believe that in her discussions with Rivenes, Miss Borchardt was made fully aware of the existence of Barn Players, Inc. If she had wished them to be the cestui que trust, she would have named them to be so in her Will. She did not. She spoke of a Society "to be established," which was "to start on the restoration program." (App. 31-32a)

Apparently, Barn Players, Inc. itself did not think after listening to a report of Rivenes that it could carry out "her intent and purpose" as the Court states, or why did they think it necessary to appoint the "subsidiary." The order of January 13, 1970, after mentioning the "subsidiary," has quotation marks around the phrase:

> "being organized for the purpose of accomplishing the objectives set out by Miss Borchardt."

An examination of the minutes of the Barn Players, Inc., dated November 13, 1962, shows the quotation in the

order appealed from is from the minutes of this date. At this meeting, after discussing a club Christmas party and help to an Indian Dance Team, Rivenes read a letter from Miss Selma Borchardt, decedent herein. Rivenes said:

> "She was interested in seeing the original Borchardt home built here. *If done,* she would then furnish the house with the original furnishings which she still has in her Washington home . . . it was decided that a 'subsidiary' of the Barn Players should be organized for the purpose of accomplishing the objectives set out by Miss Borchardt." (Emphasis supplied) (App. 35)

It is to be noted that in the minutes the word "subsidiary" appears in quotation marks.

These minutes indicate decedent's objective was to have the home built by someone other than herself. After the home was standing, she would then furnish the house. This then was Miss Borchardt's objective in the minutes of 1962, that the "subsidiary" was named to achieve and which the Judge in his January 13, 1970 order quoted.

The fact is that although the date of this meeting was November 13, 1962, six years prior to the date of Miss Borchardt's death on January 30, 1968, the "subsidiary" which was only in fact a committee of the Barn Players, Inc. had not been incorporated, and had not made a single move to do so.

An examination of other "addendum material" annexed to the petition indicated that in the minutes of March 14, 1967 Rivenes stated:

> "He was planning on going to Washington in the near future and would try to visit with Selma Borchardt to see if she was still interested in a restoration or reconstruction of the Borchardt home in Miles City."

Apparently, the committee or "subsidiary" thought this objective seemed to have petered out by 1967 as far as they were concerned.

As far as the "Subsidiary" was involved, it seems to have done just that.

In the "Seventh" and "Eleventh" paragraphs of the Will, the only intent of decedent which appears at all clear is that a "Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition" (hereinafter called the Society), was to be established and by necessary implication she did not wish to leave the bequest to Barn Players, Inc. or its committee "Subsidiary." Decedent seems to have thought out the name of the Society with great care. The establishment of this Society, nothing more, was her sentimental, personal objective. There was no time fixed in the Will for the establishment of this Society, nor when it had to be ready to start on a program of restoration of the county seat. In the meantime, Rivenes was just to hold and wait.

The Court below held correctly that this trust failed and that the Society was not in existence. What it failed to hold was that at the moment of this failure, by operation of law, title to the trust corpus vested at once in the heirs-at-law, and the question is, can the Court, by a misconception of the applicability of the cy pres doctrine, divest them of this title and give the ownership to Barn Players, Inc. as it did in its new order of January 13, 1970.

The error of the Court in doing so is magnified by the fact that Barn Players, Inc. has never been before the Court; no one is in court who can represent it; no one is in court able to enforce performance by it.

The Court never stated what the decedent's objectives were; nor what made it conclude that this group organized, as its incorporation certificate states, for social, recreational and cultural pleasure of its own members, had the legal capacity to act in the place of the "Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition," to be established as the Will requires.

The name, "Barn Players, Inc." is mentioned for the first time in the "Addendum information" furnished by Rivenes to which the Court Order of January 13, 1970 refers. Capp.

Rivenes is the trustee of a failed trust and he has no further legal or equitable interest in this estate. He is in no better position than if his name had never appeared in the Will.

Appellants, the heirs-at-law of decedent, appeal from this decision of the District Court, vesting the personalty of the failed trust in Barn Players, Inc., and request the Court to reverse the District Court and instead find that the personalty in the failed trust is vested in them.

STATEMENT OF POINTS

I. The cy pres doctrine which the Court invoked to justify vesting title of the trust corpus in Barn Players, Inc., a social club "for members" is not applicable to the facts of this case.

II. The District Court erred in vesting title to the personalty of the failed trust in Barn Players, Inc.

III. The corpus of the failed trust in "Seventh" and "Eleventh" of the Will vested by operation of law in decedent's heirs-at-law.

SUMMARY OF ARGUMENT

Appellants argue that the District Court erred in the order appealed from when it sought: (1) to "validate the trust" herein which it had correctly held "falls" in its earlier order of December 4, 1969; and (2) in vesting the corpus in Barn Players, Inc., by its misconception of the doctrine of cy pres and its inapplicability to the facts of this case.

Appellants argue that cy pres is not applicable here because the trust in "Seventh" and "Eleventh" of the Will is

a passive trust and invalid, and if it had not failed for this reason it would fail as being too indefinite and impossible to enforce. Further, the named beneficiary in the Will, the "Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition," existed only in the imagination of decedent and was never in being.

Further, *arguendo,* had the trust been valid the gift would have failed, nevertheless, for there was no clear, general charitable intent expressed in the Will. If anything, only a possible personal objective of testatrix was discernible.

The Court should not have vested the corpus in Barn Players, Inc. in any event for, by its certificate of incorporation, it is organized as a private social club "for members," and could not undertake to carry out a charitable purpose even if one had been expressed in the Will.

As a matter of law, the corpus of the failed trust in the facts here could vest only in the heirs-at-law of decedent.

ARGUMENT

POINT I

The Cy Pres Doctrine Which the Court Invoked To Justify Vesting Title of the Trust Corpus in Barn Players, Inc., A Social Club "For Members," Is Not Applicable to the Facts of This Case

The Court erred in the order appealed from in invoking cy pres.

There is no valid charitable gift under the purported Trust in "Seventh" and "Eleventh" of the Will (Exhibit "A").

Arguendo, even if the trust were valid, cy pres is, nevertheless, inapplicable for the reason that the testatrix had no clear general charitable intent and expressed none in her Will.

The Order appealed from, dated January 13, 1970 (Par. 1), states in part:

> ". . . the nominated trustee under the Will . . . seeks to validate the trust through the application of the cy pres doctrine. The Court concurs."

The Motion for Reconsideration by Rivenes (referred to by the Court as "the nominated trustee"), is examined in vain for any mention of cy pres or of anything to warrant the Court's statement that Rivenes "seeks to validate the trust through the application of the cy pres doctrine," and that "The Court concurs."

Further, no Memorandum of Points and Authorities, having been filed in support of the Motion for Reconsideration, appellant in view of all this is at a loss to understand upon what basis the Court below could have arrived at such a conclusion.

It is, therefore, necessary to review the cy pres doctrine and its inapplicability to this case. The essential elements of this doctrine have been concisely expressed in the following decisions:

> "Cy Pres is a judicial rule of construction applied to a will by which, when the testator evinces a general charitable intention to be carried into effect in a particular mode which cannot be followed, the words shall be so construed as to give effect to the general intention. It is applied only to valid charitable gifts." *First Universal Society of Bath* v. *Lewis B. Sivett, et al.* 90 A (2d) 812; 148 Me. 142, 147 (1952), quoting from *Lynch* v. *Congregationalist Parish* 109 Me. 32, 38:
>
> "The general principle running through all the cases is that, in order to apply the cy pres doctrine, there must be two prerequisites: First, a failure of the specific gift; and, second, a general charitable intent disclosed in the instrument creating the trust." *Bancroft* v. *Maine Sanitorium Ass'n. et al.*, 109 A. 585, 592 (1920).

Teele v. *Bishop of Derry*, 47 N.E. 422, 38 L.R.A. 629 168 Mass. 341 (1896-1897), emphasizes that: if it appears from the will that the intention of the testatrix was that her property should be applied to a charitable purpose whose general nature is described so that a general charitable intent can be inferred, then if, by a change of circumstances, or in the law, it becomes impracticable to administer the trust in the precise manner provided by the testatrix, the doctrine of cy pres will be applied in order that the general charitable intent which is regarded as the dominant one may not be defeated.

In *The Trustees of the Philadelphia Baptist Ass'n. et al.* v. *Hart's Executors*, 17 U.S. (4 Wheat) 1 (1819), a leading case originating in Virginia, and still the law there, the U.S. Supreme Court in a decision by Chief Justice Marshall held at page 49:

> "It is not to be admitted that legacies not valid in themselves can be made so by force of prerogative in violation of private rights. This superintending power . . . over charities, must be confined to those which are valid in law."

In summary then, cy pres is applicable only when there is a valid charitable trust; even in such cases where the gift fails for other reasons the Court will not apply cy pres unless there is a clear general charitable intent discernible within the four corners of the Will.

Applying these criteria to the Borchardt Will, cy pres is wholly inapplicable for its fails to satisfy a single one of these tests.

The District Court herein in its prior order of December 4, 1969, held that the trust in paragraph "Seventh" of the Will failed. This finding of the Court should, under the authority of the cases cited, at once preclude invoking cy pres.

In the order appealed from, however the Court states that the nominated trustee "seeks to validate the trust

through the application of the *cy pres* doctrine. The Court concurs." It becomes necessary, therefore, to examine the purported trust in the Will to see if indeed it is so structured that it must fail beyond redemption or validation by the District Court, on any theory, including cy pres.

In Paragraphs "Seventh" and "Eleventh" of the will, the purported trustee Rivenes has no powers or duties, except to hold the property and funds sought to be bequeathed in those sections. There is not even a specific direction to turn over the attempted bequests to the Society to be "established." Even assuming this can be implied, Rivenes' duties are limited to holding and turning over. A trust which invokes no active duties on the part of the trustee is a passive one. *Liberty National Bank of Washington* v. *Smoot,* 135 F. Supp. 654, 658 (U.S.D.C. D.C. 1955).

In *Jacoby* v. *Jacoby,* 80 N.E. 676 (1907), 188 N.Y. 124, 129, the Court stated, in part:

> "The projected trust is clearly a passive one which . . . transmits no title to the trustee, but devolves it directly upon those entitled to the ultimate beneficial estate."

On common law principles analogous to the theory of § 45-1201, D.C. Code (1967), relating to land, a passive trust of personalty is executed at the request and in favor of the ultimate beneficiary, if the latter is capable of taking.

In *Dunlap* v. *Jones,* 38 F. Supp. 593, aff'd 76 App. D.C. 422 (1942), the deceased designated one Lillian Jones as "trustee" of the proceeds of an insurance policy of which his daughter was beneficiary. The Court pointed out that the purported trustee, who had only to sign a receipt, had "no significant duties." This, the Court held, was a clear instance of a dry or passive trust under which title passes immediately to the beneficiary. See also *In Re*

Foster's Estate, 174 Misc. 933, 22 N.Y.S. (2d) 252, Surr. Ct. N.Y. (1940).

Cy pres then under the authorities cited cannot be invoked, for such an application presupposes the existence of a valid trust.

On December 4, 1969 the District Court held that the trust had failed. This must still have been its opinion in the order appealed from, or it would not have found it necessary to seek means of "validating" the trust.

If the trust in the Borchardt Will had not failed because it was a passive trust, it would have failed for the further reason that the purported trust bequests are too vague and indefinite to be accomplished or enforced.

The ostensible gift in paragraphs "Seventh" and "Eleventh" must fail because the words of the trust are not imperative; the subject is not certain and the object not clear.

No Court could possibly supervise these gifts. The rule here is clear. 54 Am. Jur. 48 states:

> "It is essential to the creation and validity of an express trust that it must be reasonably certain in its material terms and parts; otherwise, the administration and enforcement of it in accordance with the intention of the trustor is impossible."

In *Fisher* v. *Harrison,* 165 Va. 323. 182 S.E. 543 (1935), the Virginia Supreme Court of Appeals said, in part:

> ". . . if we adopt the only other course open to us and treat the trust clause as being unintelligible and incapable of solution, the trust would fail for uncertainty (26 Ruling Case Law, P. 1183, § 20) . . ."

The District Court then for either of the above reasons was correct in finding that the trust in the Borchardt will failed.

Having come to this conclusion, as a matter of law, it could not invoke cy pres, where there was no valid trust. and committed reversible error in doing so.

The order of January 13, 1970, however, speaks of "validating" the trust through cy pres. Contradictory in terms as this seems to be, *arguendo* then, even if the trust in the Borchardt Will were valid, cy pres could not be invoked for the Will fails to express a clear general charitable intent.

Under recognized principles of law, the interest of the testatrix must be sought *within* the framework of the will itself and not outside it. *First Universal Society of Bath* v. *Sivett, et al. supra; Matter of Silsby,* 128 N.E. 212; 229 N.Y. 396, 402 (1920); *Matter of Watson,* 186 N.E. 787, 262 N.Y. 284 (1933).

Are the desires of the testatrix in paragraph "Seventh" and "Eleventh" set forth clearly enough to be capable of accomplishment or enforcement?

The parallel language in each of these paragraphs of the Will clearly contemplates a "Society" not in existence on the date the Will was executed, December 9, 1964, but to be formed. The Will states in Seventh:

> "Until the Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition (hereinafter called the Society) has been established and is ready to start on the program of restoration of the County Seat."

Again in "Eleventh" the Will says:

> "Until the Society has been established and is ready to start on the development of the program for the restoration of the County Seat as it was approximately in the early days of its history."

From this language of the Will, a Society had to be formed and then it had to be "ready to start."

It would appear that whatever concept of this "Society" the testatrix had, the Society was still to be established and it was to be ready to start functioning.

A definition of functioning has been considered in *Fleming* v. *Moberly Milk Products Co.*, 160 F. 2d 259, 268, 269:

> "We also think the 'functioning includes elements of means, method and extent not included in mere 'existence.' "

In *Matter of Cromwell,* 198 Misc. N.Y. 114, 116 (1950), the Court states:

> "It consequently becomes plain that the word 'functioning' signified to the Testator activity constituting performance of a specified operation."

What were the testatrix' objectives for the Society to be established as far as can be gleaned from the language of the Will?

The only reference to that is in "Eleventh"—"Restoration of the County seat as it was approximately in the early days of its history."

The purported trust provisions contained in paragraph "Seventh" and "Eleventh" give no directions or powers whatsoever to the "Society."

Paragraphs "Eighth" and "Ninth" of the Will throw further confusion into a search for her intention. In it, she gives to the "Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition":

> "The family silver and dishes . . . and some family pictures, including Major Borchardt and his wife and their children and any other such family mementos as shall have value in *establishing the old home again,*"

> *The books held valuable by the family,* . . . are to be turned over to the Society, with the understanding that any that could not be cared for *in the home when established,* would be given to the public library of Miles City." (Emphasis supplied)

In Ninth—"lamps, rugs, vases and other *specially-prized household tokens,* are to be distributed to the Society . . ." (Emphasis supplied)

The testatrix did not have any clear intention capable of being enforced as to what the "Society to be established" was to restore when it was "ready to start" on the development of a program for restoration. Was it the county seat mentioned in "Seventh" and "Eleventh," or the "old home again" mentioned in "Eighth" for which the "Society" was to receive family silver and dishes and "books held valuable by the family" with the understanding "that any that could not be cared for in the home *when established,"* would be distributed as directed, and the gifts to the "Society" in Ninth of "specially prized household tokens."—What value would these gifts have in restoring the County Seat? Except as to the gift of "books held valuable by the Family," the Will is silent as to what is to happen to the other contemplated gifts to the "Society" in the event the "Society" was never established, which is, indeed, the present situation.

Reading the Will as a whole, with its many handwritten insertions, casts some doubt generally upon the clarity of the testatrix' thinking and her emotional state at the time that she wrote the instrument.

From the foregoing, it does not appear that the testatrix had a settled purpose as to the mode of applying her bequest to benefit the "Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition" still to be established. A court of chancery cannot correct this abuse of an ostensible trust.

In *Wheeler* v. *Smith, et al.*, 50 U.S. 55, 77 (1850), Justice McLean stated:

> "By what means shall it ascertain the misapplication of the fund? There is nothing to restrain the the discretion of the trustees, or to guide the judgment of the Court. If the trust can be administered, it must be administered at the will of the trustees, substantially free from all legal obligation.
>
> "If a trust be created in a party, but the terms by which it is created are so vague and indefinite that courts of equity cannot clearly ascertain either its objects or the persons who are to take, then the trust will be held entirely to fail, and the property will fall into the general funds of the author of the trust. Story's Equity Jurisdiction § 979a.
>
> "How can a court of chancery administer this trust? On what ground can it remove the trustees for an abuse of it? The discretion of the trustees may be exercised without limitation . . . In Virginia bequests stand upon the same footing as other trusts, and consequently require the same certainty as to the objects of the trust and the mode of its administration."

There is no clear, general charitable testamentary intent here, or any charitable purpose. The only rational impression that can be gleaned from "Seventh," "Eighth," and "Eleventh" is that testatrix had a personal objective in an imaginary "old home again," too vague to comprehend.

In examining a will to detect a general charitable purpose of the testator, the courts have excluded as a general charitable purpose a gift or a particular object or a particular institution.

> ". . . But if the charitable purpose is limited to a particular object or to a particular institution, and there is no general charitable intent, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, the

> doctrine of cy pres does not apply, and in the absence of any limitation over or other provision, the legacy lapses." *Teele* v. *Bishop of Derry, supra.*

First Universal Society of Bath v. *Lewis B. Sivett, et al., supra,* involved a clause in the Will of James S. Lowell, a former judge of probate in Maine, which read:

> "Tenth: I give and bequeath to the Universal Church of said Bath the sum of $5,000.; the principal to be held intact the income only to be used for the support of said church."

This church ceased to exist. The mother church to whom the edifice of the Bath Church was conveyed, the Universalist Church of Maine, claimed the gift under the cy pres doctrine. The Probate Court granted the petition. On appeal, the Court reversed, stating at page 148:

> "Although the Court cannot apply a fund held in trust, or subject to a trust, cy pres, unless it can be held for a charitable purpose, it by no means follows that all funds held for a charitable purpose may be applied cy pres upon the failure of the particular purpose for which they are held. It is only when the testator evinces a general charitable intent . . ." and at page 149, the Court continued . . . "intent must be discovered within the four corners of the instrument being construed."

The Court held that the gift was a specific one to this particular church and concluded that the gift failed. See also: *Matter of Syracuse University,* 148 N.E.(2) 671; (Heffron) 3 N.Y. 2d 665, 670-671 (1958).

Even had there been a trust in the Borchardt Will so structured as to make it valid in law, the testatrix' gift would, nevertheless, have been frustrated, for it expressed no clear, general charitable intent.

Cy pres would have been improperly invoked in any event here, in the circumstances of this case even had the trust been valid.

POINT II

The District Court Erred in Vesting Title to the Personalty of the Failed Trust in Barn Players, Inc.

As a matter of law, as heretofore presented, the District Court could not invoke cy pres in the facts of this case on any theory. Its error in doing so is the more astounding in view of "the general nature and purpose" of Barn Players, Inc. as set forth in its Articles of Incorporation, (Exhibit F) annexed to the moving papers of the motion for Reconsideration.

This was part of the "addendum information" supplied by the "nominated trustee", which the court stated in the Memorandum and Order appealed from, was the basis for its concurring "to validate the trust through the application of the cy pres doctrine."

These purposes are stated to be that it is a private, social, recreational and cultural organization "for members," of this club.

The District Court does not state the reason it thought they were qualified to be the "Society" mentioned in the Will to be established and to be called "Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition" and to be "ready to start on the program of restoration of the county seat" or "old home again" or whatever it was testatrix imagined in the way of restoration.

The error of the Court in so vesting the personalty of the failed trust in Barn Players, Inc. is obvious.

It would fall into the whole pattern of the Court's misconception of the cy pres doctrine and its inapplicability to this case.

The District Court in the order appealed from also erred in stating a "subsidiary" of Barn Players, Inc. existed,

"being organized for the purpose of accomplishing the objectives set out by Miss Borchardt."

It has already been pointed out in "Statement of Case" herein, that no subsidiary of Barn Players, Inc., the social club, had ever been incorporated. In fact, it was no "subsidiary" at all, but merely a few members who called themselves "subsidiary" or "society," in an attempt to appear to qualify for the gift under the Will; it was in effect only a committee, if anything.

The District Court realizing that title could not vest in this unincorporated group gave the bequest to them through Barn Players, Inc. In this it erred.

POINT III

The Corpus of the Failed Trust in "Seventh" and "Eleventh" of the Will Vested by Operation of Law in Decedent's Heirs-at-Law.

The District Court in its order of December 4, 1969 held that the trust in the Will in "Seventh" had failed. Appellant's position is that the same ruling must apply for the same reasons to "Eleventh" of the Will.

In the order of January 13, 1970, appealed from, the Court stated "the nominated trustee under the will of the testatrix, . . . seeks to validate the trust through the application of the cy pres doctrine. The Court concurs." In spite of the words "validate the trust," the court could not have meant precisely that for if the court believed that the invalid trust had been validated by it through the application of cy pres, it would have held that title to the corpus of the trust was vested in the nominated trustee, the person in whom title vests when a trust is valid in law. He did not do this. He invoked cy pres, erroneously, and through it vested title to the corpus of the trust in Barn Players, Inc. This indicates that its language to the contrary notwithstanding, the District Court still believed the trust had failed, and the corpus of the trust had to vest

somewhere other than in the nominated trustee. It may be concluded, therefore, that the District Court in its order of January 13, 1970 still held by implication that the trust in the Will had failed. If this is so, then it is correct to assert that in both its order of December 4, 1969 and the order appealed from, the Court held that the trust in the Will had failed.

The Court also held in its order of December 4, 1969 that there was no cestui que trust, and in the order appealed from of January 13, 1970 as to the cestui que trust, the Court stated:

> "It is found that . . . no organization has been created bearing the specific title designated by the testatrix."

The Court then, in effect, in the order appealed from, still held the same view as in its order of December 4, 1969, i.e., that the cestui que trust named in the Will was not in being.

In its earlier order of December 4, 1969, the District Court held that "for the want of a cestui que trust," the personalty in question falls into the residue.

In the order appealed from of January 13, 1970, the Court attempted to substitute a cestui que trust for the one testatrix named in her Will by invoking the cy pres doctrine.

The appeal is from that order, for in this the District Court was in error.

Cy pres is not applicable to this case as heretofore set forth in Point I.

Since cy pres is not applicable, the cestui que trust nominated by the District Court, i.e., Barn Players, Inc. is not qualified and cannot take the gift herein.

Inasmuch as there is no cestui que trust in being to take the corpus of the failed trust, and there being no other testamentary disposition of this property, by operation of law it is vested in the next-of-kin of decedent at the moment of failure. 2 *Mersch on Probate Court Practice* § 2192 and § 2195 and cases cited therein. *Dinwiddie* v. *Metzger,* 45 App. D. C. 310 (1916), cert. den. 242 U.S. 631; *Jacoby* v. *Jacoby* (1907) 188 N.Y. 124; 80 N.E. 676.

Scott on Trusts, (3rd Ed.) Vol. II, § 112, states the rule as follows:

> "*Definite beneficiary necessary.* A trust . . . cannot be created in favor of a person who is not sufficiently identified as a beneficiary of the trust . . . . In such a case the trust fails and a resulting trust arises in favor of the estate of that testator." Citing *Welford* v. *Stokoe,* [1867] W.N. 208; *Fidelity Title & Trust Co.* v. *Clyde,* 143 Conn. 247; 121 A (2d) 625 (1956).

The law on this point is set forth by Chief Justice Marshall in the leading case of *The Trustees of the Philadelphia Baptist Assn. et al.* v. *Harts' Executors,* 17 U. S. (4 Wheat) 1 (1819), at page 28:

> "The bequest was intended for a society which was not at the time and might never be capable of taking it. According to law, it is gone for ever. The legacy is void; and the property vests, if not otherwise disposed of by Will, in the next-of-kin."

The principle of this case is still the case law of Virginia. *Smith* v. *Moore,* 342 F. (2d) 594, 600 (1965).

The appellants ask this Court to hold that this is the law of this case.

CONCLUSION

Because:

1. The trusts in "Seventh" and "Eleventh" of the Will have failed;

2. The cestui que trust named in the Will is not in being;

3. The doctrine of cy pres is not applicable to this case;

4. There is no other testamentary disposition of the corpus of the failed trust;

5. By reason of the foregoing, title vests in the next-of-kin of decedent by operation of law;

this Court is requested to reverse the decision of the Court below and to hold that title is vested in appellants as the next-of-kin of the decedent.

Respectfully submitted,

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Of Counsel
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THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No's. 24,228 and 24,276
September Term, 1970
Adm. No. 480-68

IN RE:

ESTATE OF SELMA MUNTER BORCHARDT,
DECEASED

and

LOUIS CAMERA, PETITIONER

v.

SELMA MUNTER LOBSENZ BERLINER,
APPELLANT

and

DAVID G. RIVENES,
APPELLANT-APPELLEE

PETITION OF APPELLANT IN NO. 24,228
FOR RECONSIDERATION OF JUDGMENT HEREIN
AND SUGGESTION FOR REHEARING EN BANC

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Of Counsel

SELMA M. L. BERLINER

Petition of Appellant for Reconsideration of Judgment herein and Suggestion for Rehearing en Banc

Selma Munter Lobsenz Berliner, appellant herein, individually and as Committee of Margaret Lobsenz, an adjudicated incompetent and ward of the Court, by Counsel, respectfully petitions the Court for reconsideration of the judgment herein dated February 22, 1971, and suggests a rehearing en banc.

Petitioner respectfully shows that said judgment by directing that the "property which the testatrix left in her will to the Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition (Society) or to David Rivenes in trust is to be given to said Society (as incorporated under the laws of the State of Montana on January 27, 1970) or to said Rivenes in trust, as the case may be..." overlooks the following points of fact and law.

I

Said Society was not incorporated until January 27, 1970, after the date of the District Court order appealed from, and its articles of incorporation are not in the record before the Court.

Petitioner submits that the Court by giving the property to the "Society" under these circumstances has

deprived appellant of her right to prove that this corporation is a mere sham and pretense and not the Society intended in the will. Had the articles of incorporation been included in the record, appellant would have had the opportunity, for example, to point out that the purposes for which the Society is incorporated do not include "establishing the old home again." Yet paragraph "Eighth" of the testatrix's will bequeaths property to the Society for just such purpose.

Under these circumstances, petitioner feels that the judgment herein deprives appellant and her incompetent sister of property without due process of law, contrary to the safeguards of the United States Constitution.

II

The United States Supreme Court has held that a group of individuals comprising an unincorporated association must be incorporated in order to receive a legacy and that their incorporation after the testator's death (as in this case) could not cure this defect.

The United States Supreme Court held in The Trustees of the Philadelphia Baptist Association et al v. Hart's Executors, 4 Wheat (17 U.S.) 1, that in order to receive a legacy an organization must be incorporated. The Court stated at page 28:

> ". . ; but not being incorporated, is incapable of taking this trust as a Society."

The United States Supreme Court further held that individuals who composed the Association at the death of the testator could not receive the gift.

It stated at page 28:

> "The Court is decidedly of opinion that . . . . . no private advantage is intended for them. Nothing was intended to pass to them but the trust."

The United States Supreme Court held in that case that it is the situation at the time of death which controls, page 28:

> "At the death of the testator, then there were no persons in existence who were capable of taking this bequest."

That Court further held that the subsequent incorporation of the Association did not cure this defect.

Page 28: -

> "Does the subsequent incorporation of the Association give it this capacity? The rules of law compel the Court to answer this question in the negative. The bequest was intended for a society which was not at the time, and might never be capable of taking it. According to law it is gone for ever. The legacy is void and the property vests, if not otherwise disposed of by the Will, in the next of kin. A body corporate afterwards created, had it even filled the description of the Will, cannot divest this interest and claim it for their corporation."

This case, which was cited on page 24 of appellant's main brief, was apparently overlooked by the Court; it is precisely in point and controlling herein.

III

The will does not create a valid trust under which David Rivenes could take as a trustee because (1) he was at best a passive trustee and (2) the trust was too vague and indefinite to be accomplished or enforced.

The purported trustee Rivenes has no powers or duties under the will except to hold "in trust" the property and funds sought to be bequeathed to him. A trust which invokes no active duties on the part of the trustee is a passive one. (See cases cited at pages 14-15 of appellant's main brief).

On common law principles analogous to the theory of Section 45-1201 D.C. Code (1967) relating to land, a passive trust of personalty is executed at the request and in favor of the ultimate beneficiary, if the latter is capable of taking. Dunlap v. Jones, 38 F. Supp. 593, aff'd 76 App. D.C. 422 (1942).

In this case, of course, the purported beneficiary, the Society, was not capable of taking for the reason set forth under Paragraph II above. The bequest therefore failed and under the laws of intestacy passed to and vested in appellant and her incompetent sister as next of kin of the testatrix.

If the trust in the Borchardt will had not failed because it was a passive trust, it would have failed because the purported trusts bequests are too vague and indefinite

to be accomplished or enforced. (See discussion at pages 15-18 of appellant's main brief).

The will herein dated December 9, 1964 was admittedly drawn by the testatrix herself (see page 2 of appellant-appellee's brief). While the testatrix was a lawyer, her death certificate (App. 19) shows that as early as 1963 she suffered from arteriosclerosis, general. This may well explain the fuzziness of many provisions of her will: for example, the contradiction between her desire, expressed in Paragraph Eighth of her will, to utilize some of her estate for "establishing the old home again," and the purported trust provisions of Paragraph Eleventh that her residuary estate "be held in trust by David Rivenes until the Society has been established and is ready to start on the development of the program for the restoration of the county seat. . . ."

Bogert on Trusts and Trustees, Vol. 2A, p. 62 Ch. 19, Sec. 369, stating the rule as to the liberal interpretation which courts have employed in construing charitable trusts, adds:

> "But, naturally this friendly attitude cannot go so far as to create a charity out of a gift which lacks essential elements."

The language of the Supreme Court of So. Carolina is also appropriate to the facts of this case, 105 S.E. 275, 281:

> "The statute by requiring a will to be in writing, precludes a court of law from ascribing to a testator any intention which his will does not express."

IV

A trust for a mixed private and public purpose is invalid in law.

At the argument, appellant gave an additional reason why the purported trust under decedent's will, even if correctly structured in law, which it was not, would have been invalid.

Appellant-Appellee Rivenes points out in the record that decedent's purported trust gift was always intended by her to be used for the purpose of reconstructing her father's "old home again" -- i.e. probably for a private purpose. In Rivenes affidavit (App. 30) he states that "subsequent to the time Miss Borchardt disclosed her intentions regarding the bequest of personal property to the Society, the Society has engaged in numerous activities relating the subjects of financing the reconstruction of the Borchardt home as it originally appeared in Miles City during the latter part of the 19th Century. . ." (underscoring supplied).

The Court during the argument seemed by its comments and questions to have understood this clearly. Rivenes'

Counsel stated that he had a picture of this brick house with a store on the ground floor.

The will, of course, also reflects the desire of the testatrix for "restoration of the county seat." Arguendo, ignoring the fact that the estimated net estate here of $15,000 could not possibly suffice to reconstruct the house, let alone the county seat, the law would hold a trust for such dual purpose to be a mixed trust and hence invalid in law. This is so, for the testatrix in her will failed to state how much of the trust fund was to be used "in establishing the old home again" and how much to restore "the county seat."

In Gregson v. Harding, 144 A.(2d) 870, the Court stated at page 873:

> "The heirs at law are not to be disinherited by conjecture, but only by express words or necessary implication. Howard v. Amer. Peace Soc. 49 Me. 288, 291.
>
> "The Court will not invent a charitable intention where none exists. When the discretion given to the trustees is so broad that it permits a selection among private and non-charitable purposes, the trust will fail. Under such circumstances, a residuary estate would pass by way of a resulting trust to the heirs at law or next of kin. Scott on Trusts, Vol. II, Page 856, Sec. 123 furnishes several reasons underlying such a result (a) Such a trust may violate the rule against perpetuities, (b) There is no one who can enforce it, (c) The testator's intended purpose is too indefinite and uncertain. It is against public policy to permit the testator to delegate his testamentary power in this manner. For one

or more of the foregoing reasons, the vast majority of American Courts have rigidly adhered to the rule."

Again, in Scott on Trusts, Vol. IV page 2820, Sec. 392.2:

". . . it has been held in England and quite generally in the U.S. that where property is left in trust for purposes which are not limited to charity, although they may be broad enough to include charity, the intended trust fails altogether."

In re Peabody's Est. (1937) 70 P.(2d) 249, 250:

"We cannot rewrite her will. We must construe it as she wrote it. The conclusion that the testatrix had in mind either a charitable institution or one organized for private profit would be based on conjecture and not on anything written in the will. The applicable law inexorably compels us to declare a resulting trust to the next of kin."

In Montana, the same state where rebuilding of "the old home" was contemplated by decedent, the Court said (In re Swazze's Estate, Dean et al. v. Bennett, 191 P.(2d) 322, at page 326):

> "At the outset it must be remembered that while a charitable trust can be one whose purpose is beneficial to the community every purpose beneficial to the community is not a charity. Benefit standing alone is not enough to establish the trust as a charity. . . . . The Courts have refused to recognize as charitable a trust of a mixed private and public nature or one which is essentially private but has certain collateral incidental public advantages."

This decision by a Montana court runs counter to the Judgment herein.

WHEREFORE, it is respectfully requested that this petition for reconsideration of the Judgment herein and suggestion for rehearing en banc be granted.

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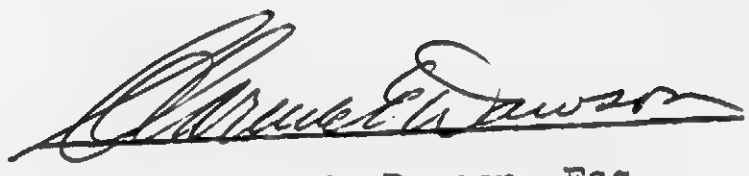
March 24, 1971

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 1971, I mailed postage prepaid, two copies of the foregoing Petition for Reconsideration of the Judgment and Suggestion for Rehearing en banc to Henry J. Siegman, Esq., 1341 Fourth Street, N. E., Washington, D. C. 20002, Daniel Webster Coon, Esq. 822 Southern Building, Washington, D. C., and John C. Duncan, III, Esq., Southern Building, Washington, D. C. 20005.



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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,228

In re: ESTATE OF SELMA MUNTER BORCHARDT, DECEASED

LOUIS CAMERA, EXECUTOR

v.

SELMA MUNTER LOBSENZ BERLINER,

Appellant

DAVID G. RIVENES

No. 24,276

In re: ESTATE OF SELMA MUNTER BORCHARDT, DECEASED

LOUIS CAMERA, EXECUTOR

v.

SELMA MUNTER LOBSENZ BERLINER,

DAVID G. RIVENES,

Appellant

BRIEF FOR APPELLEE IN NO. 24,228 AND CROSS-APPELLANT IN NO. 24276

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August 28, 1970

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*Cases and authorities marked with asterisks are chiefly relied on.

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Appellant

BRIEF FOR APPELLEE

STATEMENT OF QUESTION PRESENTED

Did the lower court err in ruling that (1) testatrix displayed a general charitable intent by bequeathing certain property to the Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition and (2) that such intent could be

carried out through the District Court's application of the doctrine of *cy pres* in favor of Barn Players, Inc.?

COUNTER STATEMENT OF THE CASE

Appellant's statement of the case may be somewhat confusing to the court since appellant attempts to paraphrase the agreed statement of facts and liberally intermingles her argument with the facts.

However, appellee shall attempt to clarify one or two points set forth in appellant's statement of the case.

Appellant states that decedent's "closest surviving next of kin are cousins of the first degree, the appellant and her unmarried incompetent sister". Appl. Br. p. 4. The record in these proceedings indicates that a third person has filed an appearance in the proceedings below also alleging to be a first cousin of the decedent, namely a Mrs. Frieda Bucky. Testatrix also mentions Mrs. Bucky as a cousin in Item First of the will, but nowhere mentions the appellants. J.A. 14. In addition, appellant filed a motion in the trial court to have herself and her sister declared sole heirs at law and next of kin of decedent (J.A. 46) but in view of the lower court's disposition of the matter, that motion was not ruled on.

Insofar as the merits of this appeal are concerned, it should be pointed out that testatrix was an attorney whose primary area of interest was labor law. She prepared her own will and due to the language and method used in the will to insure the continued esteem with which her father, Major Borchardt, was and is held in Miles City, Montana, (where Major Borchardt played an important role in its early settlement and was its first United States Postmaster) this matter has experienced protracted litigation. J.A. 17.

In Items Seventh and Eleventh (the residuary item of her will) decedent left various items of property together with the "remainder of my estate" to "be held in trust by David Rivenes until the Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition (hereinafter called the Society) has been established and is ready to start on the program of restoration of the County seat . . ." J.A. 16, 17.

Under Items Eighth and Ninth, the decedent made the following bequests:

> EIGHTH. In addition to the above-named furniture, I direct that the following items be given to the Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition: The family silver and dishes. Such special properties as are of interest and value in the restoration of the early western setting; these include three large original signed crayons framed in keeping with the pattern of the period and some family pictures including Major Borchardt and his wife and their children and any other such family mementos as shall have value in establishing the old home again, and also including the document signed by Governor Potts, territorial governor at that time, appointing Major Borchardt to the Board of County Commissioners of Custer County and the proclamation of his appointment as Postmaster of Custer County given by President Arthur. The books held valuable by the family, including many which are several hundred years old, are to be turned over to the Society with the understanding that any that could not be cared for in the home when established, would be given to the public library of Miles City.
>
> NINTH. I direct that such items which have not been specially provided for, lamps, rugs, vases, and other specially-prized household tokens, are to be

distributed to the Society and among friends as the executors decide.

The lower court, (Honorable Matthew F. McGuire) in ruling upon the executor's petition for instructions ruled on December 4, 1969, *sua sponte* without argument or memorandum on that point, that because the *cestui que* trust was not then in legal existence, the trust in Item Seventh failed and fell "into the residue". Judge McGuire did not rule on Item Eleventh even though it contained similar language as Item Seventh. In addition he did not rule on Items Eighth and Ninth which bequeathed specific items of property directly to the "Society".

Appellee then filed a motion for reconsideration, or in the alternative for clarification on this point. Appellee pointed out that Barn Players, Inc. had established an unincorporated subsidiary[1] in 1962 and adopted for its name the name suggested by decedent. J.A. 37. Judge McGuire then applied the doctrine of *cy pres* in favor of Barn Players, Inc., J.A. 63, a non-profit corporation which has been preparing for the time when decedent's bequests would be available to form the nucleus to commence the restoration of the old county seat. J.A. 35, 36, 37, 38.

It is this ruling, by-passing David Rivenes as trustee and conferring the decedent's property directly upon Barn Players, Inc. under the doctrine of *cy pres*, that is presently before this Court for review. J.A. 63.

---

[1] Since incorporated under the laws of the State of Montana on January 27, 1970.

RULING OF THE COURT BELOW

On January 13, 1970, the Court below entered an order modifying an earlier order dated December 4, 1969 instructing the executor to deliver certain properties, bequeathed to David Rivenes as trustee, to Barn Players, Inc., a non-profit corporation of Montana, under the doctrine of *cy pres*.

ARGUMENT

I. THE DOCTRINE OF CY PRES IS NOT INAPPLICABLE TO THE FACTS OF THIS CASE

Appellant's primary argument appears to be that the doctrine of *cy pres* is not applicable to the facts of this case because the decedent did not display a general chartiable intent in the will. Such a position would lead one to believe that appellant did not read the will in its entirety.

As appellant points out at page 9 of her brief: "The establishment of this Society, *nothing more*, was her (testatrix) sentimental personal objective." (Emphasis added) The primary question in any will construction case is always—What is the intent of the testator?

It is submitted that although the will here in issue is not the most artfully drawn, the intent of the testatrix may easily be gleaned from a reading of the entire will. *Dean v. Tusculum*, 90 U.S. App. D.C. 304, 195 F.2d 792 (1952).

It is crystal clear, and admitted by appellant, that the decedent's prime objective was the establishment of "The Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition." The very name of the Society (the child of the testatrix) discloses the charitable intent of the decedent. Obviously the bequest is directed to the preservation of the specifically bequeathed

property which she felt played a role in the folklore, legend, history and tradition of Custer County, Montana. And one might ask "For whom did testatrix wish to preserve the folklore, legend, history and tradition of Custer County, Montana?" Certainly not for the testatrix because at the time the will takes effect, she would be dead. Obviously her intention was to preserve these items for the public generally and for the people of Custer County, Montana specifically. As Miss Borchardt points out in Item "Eighth" of her will, her father, Major Borchardt, played an important role in the development of this virgin wilderness, having been appointed the first postmaster of Custer County by President Chester A. Arthur and to the Board of County Commissioners of Custer County by the then territorial Governor, Benjamin Franklin Potts. Is it possible to find in one's actions a more charitable intent than for a person to make a gift with the stated purpose that it be preserved for the enjoyment of present and future generations of the public as a whole?

Appellant challenges the validity of testatrix' charitable intent by questioning the identity of the beneficiaries. If ". . . the uncertainty of the persons to be relieved by a charitable fund could be available to destroy it, few charities could be sustained. If all the recipients of a charity could be designated with certainty at the time of its creation, there would be no necessity for a law of charitable uses different from that which governs all other trusts." *St. Louis Union Trust Company v. Little*, 10 S.W.2d 47, 49 (Sup. Ct. Mo. 1928). Thus the Court must look to see if the class to be benefited is sufficiently designated in deciding whether the trust is valid. In the instant case it is obvious that the testatrix intended to benefit the people of Custer County as well as others interested in history, folklore and legend by preserving for them articles of her father's which he used in developing this area of the country.

The first definition of the purposes required of a charitable trust in the District of Columbia was given in *Ould v. Washington Hospital for Foundlings*, 95 U.S. 303 (1877). There Mr. Justice Swayne held that "anything that tends to promote the well-doing and well-being of social man" is a charitable purpose. A more recent definition of a charitable trust in the District of Columbia is found in *Noel v. Olds*, 78 U.S. App. D.C. 155, 159, 138 F.2d 581 (1943), *cert. denied*, 321 U.S. 773 (1944) as being a trust that is created to confer a public benefit. Certainly the breadth of these definitions is ample to encompass a trust created for the restoration, renovation, preservation and construction of historically educational buildings and artifacts for the public as was invisioned by testatrix. The question of the validity of a trust for the preservation and restoration of historical homes and artifacts, for public benefit, is not a novel question. Under definitions similar to those found in the District of Columbia, other courts have invariably found that this type of purpose is a valid charitable trust. *Smith v. Powers*, 83 R.I. 415, 117 A.2d 844 (1955); *Stennis v. City of Appleton*, 230 Wis. 530, 284 N.W. 492 (1939); *Jones v. Habersham*, 107 U.S. 174 (1883).

Once it is found that a valid charitable intent exists the courts of the District of Columbia have uniformally applied the doctrine of *cy pres* where necessary to carry out that intent, *Ould v. Washington Hospital for Foundlings*, 95 U.S. 303 (1877), *Colbert v. Sper*, 24 App. D.C. 187, aff., 200 U.S. 130 (1904), *Noel v. Olds*, 78 U.S. App. D.C. 155, 138 F.2d 581 (1943), *cert. denied*, 321 U.S. 773 (1944).

Notwithstanding the above, even if this Court should find that the lower court's application of *cy pres* was not warranted, appellee submits that there is no reason why Rivenes should not be vested with testatrix' property as trustee.

II. THE DUTIES CONFERRED UPON RIVENES AS TRUSTEE BY THE TESTATRIX ARE SUBSTANTIAL IN NATURE AND THE ARGUMENT OF APPELLANT THAT THE TRUST IS PASSIVE IS NOT SUBSTANTIATED BY THE TESTAMENTARY INSTRUMENT IN ISSUE.

At page 14 of appellant's brief, she asserts that the trust in Rivenes is invalid because it is a passive trust and "invokes no active duties on the part of the trustee".

As Judge McGarraghy said in the case of *Liberty National Bank of Washington v. Smoot*, et al., 135 F. Supp. 654, 658 (D.C.D.C. 1955):

> "It is for the Court to determine whether the words used by the testator, *in light of the circumstances surrounding the creation of the trust* impose some duty upon the trustee other than merely to convey. As the Court said in *Fidelity Union Trust Company v. Mints*, 125 N.J. Eq. 52, 46 A.2d 44, 45 (1939) 'a trustee must conform to the provisions of the trust in their *true spirit, intent and meaning, and not merely in their letter*'" (Emphasis added).

Thus the language expressly used by a testator and the intent derived from the nature of the trust created should be liberally construed to determine if the duties of a trustee are sufficient to create an active trust. *In re Berglands Estate*, 372 Pa. 1, 92 A.2d 207 (Sup. Ct. Pa., 1952); *Ould v. Washington Hospital for Foundlings*, 95 U.S. 303 (1877).

A cursory reading of the will here in issue clearly shows that specific duties are required of the trustee. In Item "Seventh" of the will the trustee is required to hold the "furniture listed" in

trust.[2] The very nature of these articles, (many of which are antiques considered especially valuable by the people of Miles City, Montana) require great care in the handling, storing and preservation of them. The responsibility for this supervision and care falls directly and completely upon the trustee, Rivenes.

In addition, under Item "Eleventh" of testatrix' will the trustee is to take the sum realized from the sale of the property at 1741 Park Road, N.W., Washington, D.C. "together with the rest, residue and remainder" of the estate and hold them in trust until such time as in his discretion the Society is prepared to restore the county seat. These duties of preserving the furniture and of investigating the status of the Society, in order to assist him in deciding when to deliver the monies and property held by him to the Society, are duties which appellee contends are forthcoming from the express language of the will and as the District Court for the District of Columbia has stated, where "the trustee is required to take active steps to preserve the property" such activity is sufficient to create an active trust. *Liberty National Bank of Washington v. Smoot, et al.*, 135 F. Supp. 654, 659 (D.C.D.C. 1955); also see *Breeden v. Cooper*, 383 Pa. 109, 118 A.2d 151 (Sup. Ct. Pa. 1955); *Robertson v. Swayne*, 378 P. 2d 195 (Sup. Ct. Idaho 1963); *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E.2d 478 (Sup. Ct. N.C. 1957). However, if this Court should determine that the express language of the will is inadequate to create sufficient duties on the part of the trustee to create an active trust the very nature of the bequest, together with the true spirit and intent of the testatrix, confer important duties upon the trustee by implication and necessity.

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[2] This bequest has failed and has been added to the residue of the estate by the lower court's decision because the list referred to in the will was not attached to it.

Appellee wishes to again bring the attention of the Court to the fact that even appellant recognized the charitable intent of the testatrix (page 9 of appellant's brief). Here appellant indicates that testatrix' overall controlling purpose in devising her estate was "the establishment of the Society, nothing more." This personal object caused Selma Munter Borchardt to invest Rivenes with the power of a trustee. In both Items "Seventh" and "Eleventh" Rivenes is to hold the articles described, in trust until the Society is "ready to start" on the program of restoration of the county seat. Obviously testatrix felt that the monies and property would be suitably maintained by Rivenes. The wording of the items[3] also indicates that testatrix realized that the Society would be coming into existence after her death. Thus, the decision of when the Society was capable of beginning restoration would have to be left to someone other than herself. It seems apparent from the sentence structure of items "Seventh" and "Eleventh" that the discretion of Rivenes, as to the capability of the Society to initiate restoration work, was required by the testatrix. This exercise of discretion has previously been found to constitute a duty sufficient to create an active trust. In the case of *In re Bergland's Estate*, 372 Pa. 1, 92 A.2d 207 (Sup. Ct. 1962) the Supreme Court of Pennsylvania found an active trust created when the duties required of the trustee were very similar to those required of Rivenes under the Borchardt will. The trustee there was to transfer the estate to the beneficiary only when it was proved to his satisfaction that the beneficiary was the sister of the testatrix. In the case at bar it would seem that the testatrix feared her money and articles would not be properly used if merely given to the organization. However, with the articles in trust the Society would be provided with an impetus to sufficiently ready itself to

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[3] "be held in trust by David Rivenes, of Miles City, *until* the society has been established etc." (Emphasis added).

restore the county seat and the testatrix' father's old home. Thus, testatrix' expressed intent would seem to confer upon Rivenes the discretion required in determining when the Society was prepared to begin restoration. Appellee realizes that "the automatic function of receiving for the *cestui que* trust, and merely paying over to him the trust fund or its income, will not make a trust active . . . but when the trustee is invested with a discretion, *however slight*, he takes the place of the donor and the trust committed to him is active." (Emphasis added.) *Breeden v. Cooper*, 383 Pa. 109, 118 A.2d 151, 153 (Sup. Ct. Pa., 1955) quoting *Hemphill's Estate*, 180 Pa. 95 at 96, 36 A. 409 (Sup. Ct. Pa. 1897).

If Selma Munter Borchardt were alive today and wished to effect this gift it would be her discretion which would be used in determining when the Society was prepared to begin restoration; however, in her absence, Rivenes as her trustee is vested with this determination which of necessity carries with it an active duty-namely, investigation, analysis and decision. It would seem that the exercise of the trustee's discretion is an inherent duty created both from the very nature of the trust and the intent of the testatrix. Certainly if in Rivenes' mind the Society was not prepared to begin restoration his duties of preserving the estate would continue and the trust would remain active until the Society was so prepared, or failing in this regard completely, until the trustee sought and received instructions from the court.

The existence of such discretion and the exercise thereof by the trustee also answers plaintiff's objection that the trust is not specific enough to be enforced. Merely because the testatrix does not set forth in the will any specific plans or methods of administering the trust does not cause the trust to fail for reason of vagueness. *Powers v. First National Bank of Corsicana*, 137 S.W.2d 839, *Aff.*, 138 Tex. 604, 161 S.W.2d 273 (1940); *Bogert, Trusts and Trustees,*

2d ed., Sec. 371 (1964). The reasoning behind this rule of law is that it helps benefit public trusts, and dispell any question of whether the trust is active or passive; that is to say, in public trusts there is an implied grant of authority in the trustee to decide on the specific methods of implimenting the trust. *Gallagher v. Armstrong*, 114 Colo. 397, 165 P.2d 1019 (1946). Thus Rivenes' discretion, coupled with this implied authority to help determine the best methods of implimenting the trust, creates an active trust and one which is specific enough for enforcement since Rivenes must determine, not only if the Society is ready to begin, but also, if the methods chosen by the Society are the best methods of implimenting the trust.

Finally, it would appear that appellant's argument that the trust is passive and therefore fails is irrelevant to the present proceedings. It would appear that the distinction between active and passive trusts applies only to private trusts and not to public or charitable trusts. *Bogert Trusts and Trustees* 2d ed., Sec. 206, p. 383 (1964).

III. BARN PLAYERS, INC. IS CAPABLE OF ACCEPTING A CHARITABLE TRUST UNDER THE DOCTRINE OF CY PRES

Appellant suggests that the District Court erred in vesting title in Barn Players, Incorporated because of its general nature and corporate purposes. However, appellee contends that the Articles of Incorporation, and the nature of the work to be performed, are adequate and sufficient to permit the vesting of the property in Barn Players, Inc. through the doctrine of *cy pres* as applied by the District Court.

Article I Section 4 of the Articles of Incorporation of Barn Players, Inc. states that the corporation will "carry out the obligation or provisions of *any* trust imposed by *will* or deed of trust or

otherwise." (Emphasis added). Therefore, The Articles of Incorporation themselves allow the Barn Players to fully accept the obligations of the trust and carry out the specific intent of Selma Munter Borchardt. Certainly appellant could not say that the corporation is legally incapable of being invested with the trust.

Secondly, appellant would have us look solely to the social nature of Barn Players, Incorporated and the nature of the task required to fulfill testatrix' wishes in order to discount the trust. Appellant argues that Barn Players, Incorporated has a social side exclusively for the benefit of its members. Appellee agrees that there are certain social characteristics associated with Barn Players, Inc. mentioned by appellant; however, Article I Sections One and Two of the Articles of Incorporation, (the provisions relied upon by appellant) in no way inhibit the corporation under Article I Section 4 of the Articles of Incorporation from taking on the obligations of this trust. In addition a trust which requires the renovation and restoration of buildings as they were years ago requires the corporation doing the work to have a certain inherent character. Appellee suggests that the type of person acclimated to this type of work is a person with a desire for authenticity, detail and the ability to improvise if the funds available, or the surroundings, are not sufficient to accomplish complete restoration. It would seem that each of these abilities are found in abundant quantitites in a type of association such as Barn Players, Inc. The people which make up a theatrical organization such as this usually have the know how for finding, through research, the manner in which homes and other buildings were built and decorated decades ago. Also these people have the ability to recreate in life like character and detail, such as is done on the stage, the very life styles of another generation. Certainly all have seen the realistic effect of a stage backdrop or setting when money or room did not permit a complete reproduction of the scene. Each of these attributes is the type which is required in

undertaking renovation of testatrix father's home and the county seat as they were in the 1800's.

Therefore, appellee contends that there is no legal reason for denying Barn Players, Incorporated this trust and the very nature of the trust, and of the corporation, shows a compatibility which was recognized by the lower court in its application of *cy pres*.

Should this Court find that the application of the doctrine of *cy pres* was not the most desirable way to handle the instant bequest, it would not be inappropriate for this Court to remand this matter to the District Court with instructions to deliver the property to Rivenes as trustee. Appellee has already demonstrated that a valid charitable trust exists. Thus the only question to be answered, before allowing Rivenes to administer the trust is whether a trust created for the benefit of a charitable organization to come into existence after testatrix' death, is valid.

The authorities are practically unanimous in holding that a testamentary trust created for the purpose of administering property for the benefit of a corporation not in existence at the time of testator's death is valid. *Palmer v. Evans*, 124 N.W.2d 856 (Sup. Ct. Iowa 1963); *In re Myra Foundation*, 112 N.W.2d 552 (Sup. Ct. N.D. 1961); *In re Harbert's Estate*, 99 Ariz. 323, 409 P.2d 31 (Sup. Ct. Ariz. en banc 1965); *Restatement, Trusts, Second*, Section 401(j) (1959). To add validity to this position, if indeed such is needed, it should be noted that the Supreme Court of the United States has twice held that a gift in trust for a charity or charitable corporation not existing at the date of the gift, is valid. *Ould v. Washington Hospital For Foundlings*, 95 U.S. 303 (1877); *Russell v. Allen*, 107 U.S. 163 (1883). The Supreme Court in *Ould* decided a case which arose originally in the District of Columbia and specifically stated that ". . . a gift may be made to a charity not *in esse* at the time, to come into existence at some uncertain time in the

future, provided there is no gift of the property in the first instance, or perpetuity in a prior taker, Perry, Tr., Sec. 736." at 24 L. Ed. 452.

Therefore, even if this Court should decide that the lower court erred in using *cy pres*, the intent of the testatrix can still be validly performed through the trustee Rivenes.

CONCLUSION

For the foregoing reasons, it is submitted that the objections of appellant to the validity of testatrix' will should be overruled and the decision of the District Court affirmed, or in the alternative, this Court should return this case to the District Court with instructions to deliver the property in question to David Rivenes as trustee to carry out the intent of Selma Munter Borchardt.

Respectfully submitted,

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Attorney for Appellee
David G. Rivenes

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,276

In re: ESTATE OF SELMA MUNTER BORCHARDT,

Deceased.

LOUIS CAMERA, Executor,

v.

SELMA MUNTER LOBSENZ BERLINER,
DAVID G. RIVENES,

Appellant.

BRIEF FOR CROSS APPELLANT

STATEMENT OF QUESTION PRESENTED ON CROSS APPEAL

Is the word "friends" sufficiently definite and descriptive to determine with particularity the recipient of a bequest when said word is used in a will as follows: "I direct that such items which have not been specifically provided for . . . are to be distributed . . . among *friends* as the executors decide"?

STATEMENT OF THE CASE ON CROSS APPEAL

Item "Ninth" of the Last Will and Testament of Selma Munter Borchardt provides as follows:

> NINTH: I direct that such items which have not been specifically provided for, lamps, rugs, vases, and other specially-prized household tokens, are to be distributed to the Society and among friends as the executors decide. J.A. 17.

Counsel for the executor of the estate advised Mr. Rivenes, Trustee for the Society, that the executor was going to distribute certain items of property under the aforesaid provision of the will to various individuals. Counsel for Mr. Rivenes then advised him that Rivenes was of the opinion that that provision of the will was void insofar as it referred to "friends" and that any distribution of property under said provision would be opposed.

The executor then filed a petition for instructions with the court and after hearing, the trial court held on December 4, 1969 that "the category of 'friends' is sufficiently designated and not vague in the circumstances, and in addition to that, the intent of the testatrix is complied with, since discretion is vested in the Executor". J.A. 25.

Rivenes then filed a motion for reconsideration on this point (as well as on the point raised in the original appeal herein) and the court, on January 13, 1970 ruled on that portion of said motion as follows: "With reference to Paragraph 9, the Court adhers to its initial conclusion. The resignation of one of the executors[4] is of no moment." J.A. 63.

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[4]Louis Camera and Mathilde Eikes were nominated by the decedent as co-executors; however, Mathilde Eikes renounced her nomination and Louis Camera was appointed and qualified as sole executor, J.A. 2.

This portion of the lower court's order of December 4, 1969 and January 13, 1970 is before the Court for review on this cross appeal.

This matter has not been before this Court at any prior time under this name or any other name.

RULING OF THE COURT BELOW

On January 13, 1970, the court below entered an order affirming its original finding, with respect to item "ninth" of testatrix' will, as presented in an order dated December 4, 1969 allowing the executor to deliver certain property to "friends".

ARGUMENT ON CROSS APPEAL

Cross appellant's position with respect to the cross appeal is that the language of the will must indicate with reasonable certainty who the beneficiary is, and without such certainty, the attempted gift is void. *Dalton v. White*, 76 U.S. App. D.C. 93, 129 F.2d 55 (1942); *District of Columbia et al. v. Adams*, 57 F. Supp. 946 (D.C. D.C. 1944); *Page on Wills*, Section 34.1 (1961). In *Dalton v. White*, 76 U.S. App. D.C. 93, 94, 129 F.2d 55 (1942) this court demonstrated that a bequest "to each one of my cousins living at the time of my death, irrespective of the remoteness of their relationship . . ." was void for uncertainty because by the use of the term "my cousins", the testatrix did not have in mind a definite category of persons. This court further held that: "we are not at liberty to guess what individuals, if any, she had in mind." 76 U.S. App. D.C. 93, at 94. Certainly, if cousins is too indefinite to sustain a bequest the term friends is also.

The executor and the court below could only speculate as to which individuals were "friends" of the testatrix and which "friends"

were to receive testatrix' bounty. In *Clark v. Campbell*, 82 N.H. 231, 133 A. 166, 45 A.L.R. 1433 (1926), the testator had bequeathed property to trustees "to make disposal . . . to such of my friends as they, my trustees, shall select." The court held the attempted bequest void for uncertainty of beneficiaries stating:

> In the case now under consideration the cestuis que trust are designated as the "friends" of the testator. The word "friends," unlike "relations," has no accepted statutory or other controlling limitations, and in fact has no precise sense at all. Friendship is a word of broad and varied application. It is commonly used to describe the undefinable relationships which exist, not only between those connected by ties of kinship or marriage, but as well between strangers in blood, and which vary in degree from the greatest intimacy to an acquaintance more or less casual . . . The only implied limitation of the class is that fixed by the boundaries of the familiarity of the testator's trustees with his friendships. If such familiarity could be held to constitute such a line of demarcation as to define an ascertainable group, it is to be noted that the gift is not to such group as a class, the members of which are to take in some definite proportion (Jarman Wills, 534; 2 Schouler, Wills, § 1011), or according to their needs, but the disposition is to "such of my friends as they, my trustees may select." No sufficient criterion is furnished to govern the selection of the individuals from the class. 133 A. 166 at 170.

In the proceedings in the court below, the executor never defined which "friends" of the testatrix would receive a gift and the trial court never set forth any standards for the executor to follow in distributing the property to "friends". In *Early v. Arnold*, 119 Va. 500 (1916), the testatrix devised property "to . . . whoever has been his (testatrix' son) best friend." The court found the attempted

devise void for uncertainty because the expression "whoever has been his best friend" was too indefinite for anyone to determine who was intended as the object of testatrix' bounty. The Court in *Early v. Arnold*, 119 Va. 500 (1916), unlike the trial court below, recognized that the law requires the beneficiary of a testator to be designated with certainty and that "it would be difficult for anyone living to say who his best friend was, and it is certain that no court can declare who was the best friend of a dead man." *Early v. Arnold*, 119 Va. 500, 504 (1916).

Certainly, the executor does not know all the individuals that testatrix considered as friends within the context of her will, and it is equally certain that the trial court could not declare which individuals were "friends" of the testatrix; consequently, the gift is void for lack of definite takers *Armington v. Meyer*, 236 A.2d 450 (Sup. Ct. R.I. 1967).

Assuming arguendo, that an individual considered himself to be a "friend" of the testatrix, and that he believed that he was entitled to some of the testatrix' property under Item "Ninth" of the will, what standards would the executor or a trial court follow in determining whether that individual was (1) a "friend" and (2) a "friend" entitled to property? It is patently clear that the only determinative in deciding who are "friends" entitled to a bequest would be the executor's discretion, for, surely the court could not determine whether an individual is a "friend" within the context of Item "Ninth" of the will. In an analagous situation, this court held that language similar to that in the case at bar was not valid since the identity of individuals to whom property would be distributed was uncertain. In *General Clergy Relief Fund v. Sharp*, 43 App. D.C. 126 (1915), the testatrix requested in her will that the executors "distribute [certain property] . . . among such persons as my executors, or the survivors of them, shall deem proper." Substituting "among my

friends" for the words, "among such persons", it is clear that Miss Borchardt's designation is just as uncertain as the designation "such persons as my executor shall deem proper." It is submitted therefore, that the bequest to friends is void for uncertainty and the property referred to in item "Ninth" falls into the residuary estate pursuant to Section 18-308 District of Columbia Code (1957 Edition). See also *Clark v. Campbell*, 82 N.H. 231, 133 A. (1926).

SUBMISSION OF CROSS APPEAL WITHOUT ORAL ARGUMENT

Cross-appellant, David G. Rivenes, submits this cross appeal on the briefs filed without oral argument, unless requested by the cross-appellee.

CONCLUSION

For the foregoing reasons, it is submitted that this Court should reverse the decision of the court below, with respect to Item "Ninth" of testatrix' will, and hold that Item "Ninth" is not sufficiently definite and descriptive to determine with particularity the beneficiaries and therefore the property described should fall into the residuary estate.

Respectfully submitted,

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In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 24,228

Estate of Selma Munter Borchardt,
Deceased

Louis Camera, Executor

v.

Selma Munter Lobsenz Berliner,
Appellant

David G. Rivenes

Appeal from the United States District Court for the District of Columbia

REPLY BRIEF OF APPELLANT
Selma M. L. Berliner, individually and as Committee of Margaret Lobsenz

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AS TO APPELLEE'S STATEMENT OF QUESTION PRESENTED

On page 1 under this heading, Appellee poses the question "Did the lower court err in ruling that (1) testatrix displayed a general charitable intent by bequeathing certain property to the Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition." (Emphasis supplied).

Neither in its order of December 4, 1969 or in the order appealed from of January 13, 1970, did the lower court ever make such a ruling. These orders of the lower court are set forth on pps. 2 and 3 of Appellant's main brief and (App. pp. 25,63)

At no time was there any ruling by the lower court that a charity of any kind existed in the Will, nor was there ever a mention of testatrix having any charitable intent, let alone a clear general charitable one.

No such ruling ever having been made, Appellee brings before this court a holding not in either of the orders of the court below.

The lower court on December 4, 1969 held the purported trust failed and no cestui qui trust was in

existence to take the gift. On reconsideration on January 13, 1970 the Court without changing these findings ruled " - - the nominated trustee under the Will, in his motion for Reconsideration - - - seeks to validate the trust through the application of the cy pres doctrine. The Court concurs."

The Court below as pointed out in Appellant's main brief, did not say it "validated" the trust through cy pres but instead nominated its own cestui que trust in place of the one named in the Will, by giving the gift to Barn Players, Inc., a social club for members.

As stated in the main brief Appellant's position is that the trust in "Seventh" and "Eleventh" being invalid, and no cestui que trust being in existence at the time of testatrix' death, title to the corpus of the purported trust vested at once in the heirs at law. In the circumstances here, Appellant contends that the heirs at law should not be divested of this title as the court below did, by invoking cy pres to give the gift to Barn Players, Inc., never a party in any proceeding in this Court, but selected by the Judge below from "addendum material."

AS TO APPELLEE'S COUNTER-STATEMENT OF THE CASE

Appellee on page 2 expresses concern "that Appellant's statement of the case may confuse the court." He uses this phraseology in an oblique effort to question whether Appellant and her sister are the sole heirs at law, and mentions a Mrs. Frieda Bucky.

He seems to have overlooked the fact that in the Agreed Statement of Facts (App. p.8) it states "Appellant and her sister Margaret Lobsenz, are related to lecedent Selma Munter Borchardt as cousins of the first degree." While Appellant has not said in so many words in her brief that she and her sister are the sole heirs at law, she believes that to be the fact. (Ex. G, App. p. 47-48. She is not aware of any present intention by Mrs. Bucky to press her claim. Her name appears at the end of a paragraph bequeathing small legacies to second and third cousins. (See affidavit of Hazel Harris as to relationship of parties Ex. G, App. p. 59-60.

Appellee also sedulously fails to mention that David Berliner, the son of Appellant Selma M. L. Berliner, under the Will in paragraph "First" receives gifts of great personal sentiment, and his family lineage is there described.

Appellee, also, in referring to Appellant and her sister, fails to point out that Margaret Lobsenz is an adjudicated incompetent and hence the Ward of this Court as she is of any court in which, as here, she is a party.

This issue, however, is not before the Court at this time.

Finally Appellee on p. 2 states "insofar as the merits of this appeal are concerned," but he does not address himself to the issues at all. Instead he speaks of decedent and her father Major Borchardt. Although his remarks are not relevant to the issues involved, in the interest of accuracy Appellant will not ignore them.

Appellant would point out that the lack of clarity of the Will here was not due, as Appellee suggests, to any inadequacy of Miss Borchardt as a lawyer. She was considered a competent lawyer. The record shows (Ex. B, App. p. 19), that for five or more years prior to her death she suffered from Arteriosclerosis General. She died on January 30, 1968. She executed her Will on December 9, 1964, a little over three years prior to her death.

A reading of the Will itself with its many handwritten changes, and emotional sentiments, (App. pp.14-18)

especially paragraphs "Third" and "Fourth,") her failure in paragraph "Seventh," to attach the list of furniture she stated was attached, the "reservation of a life interest in herself," in a testamentary instrument, all reflect on the lack of clarity of her thinking at that time.

Appellee states on pages 2 and 3 of his brief that Major Borchardt was and is held in Miles City, Montana, in high esteem. Appellant herself has held him in warm affection, but the fact is that it is realistic to recognize that very likely few, if anyone among the present inhabitants of Miles City, ever knew or heard of Major Borchardt. Decedent died at the age of 72 years. She was born in Washington, D.C. (Ex. B, App. p. 19). Major Borchardt, since approximately 1882, had lived in New York and Washington, D.C. and never once in all those years revisited Miles City.

It was the testatrix who did that in 1962, seeking information concerning her father. (Addendum Information Ex. F, App. pps. 34,35,42-45).

She found an apartment house on the site of the "old home" and nothing physically there concerning him.

It was testatrix who harbored the personal ambition to make her family name of importance in Miles

City, by getting a building put up as the "old homestead." There are references in "Eighth" of the Will to "family silver and dishes," "family pictures including Major Borchardt and his wife and their children and such other family mementos as shall have value in establishing the old home again," and "books held valuable by the family." (Ex. A, App. p. 16-17). The record does not show that either she or anyone else had any idea what that building should look like.

Case law in similar situations holds that such gifts lack charitable intent and are described by court decisions as personal vanity, and as memorials masquerading as charities. Med. Soc. of So. Car. v. So. Car. Nat'l. Bank, 197 S.C. 96, 107 (1940); Matter of Syracuse University (Heffron), 148 N.E. 2d 671; 3 N.Y. 2d, 665, 670-671 (1958).

While Rivenes was not aware how limited Miss Borchardt's funds were, she herself realized that she had not sufficient funds to put up a building, and left Rivenes in no doubt about that. As set forth on p. 8 of Appellant's main brief, Rivenes said: "She was interested in seeing the original Borchardt home built here. If done, she would furnish the house, - - -." (Emphasis supplied).

Clearly, then, the house was to be standing, constructed by others, before any of her property was to be used.

It is questionable whether the estimated net residuary estate of decedent of $15,000 (Agreed Statement App. pp. 7) would be sufficient even for completing the furnishing of the "old homestead," if it ever were to be constructed.

It becomes obvious why in the Will testatrix left nothing to restore anything. It was a Society for which she merely created a name which was to do this. She herself was interested only in the "old home again."

Appellee cannot point to any language in the Will to support his statement on p. 4: "Judge McGuire then applied the doctrine of cy pres in favor of Barn Players, Inc. - - - - which has been preparing for the time when decedent's bequests would be available to form the nucleus to commence the restoration of the old county seat."

Testatrix made no bequest for any such purpose, and Appellee fails to set forth any language of the Will he claims does this.

AS TO THE ARGUMENT

I

"The Doctrine of Cy Pres Is Not Inapplicable To The Facts Of This Case"

Appellee's title to this point is indeed astonishing. He does not make the direct statement that the Doctrine of Cy Pres is applicable. Rather he presents the point from a weaker conviction "Cy Pres Is Not Inapplicable."

Immediately in the first paragraph on p. 1 of his brief, he indicates a complete misunderstanding of Appellant's Point I. "Appellant's primary argument," to use his language, is not as Appellee states that "cy pres is not applicable to the facts of this case because the decedent did not display a general charitable intent in the Will."

Appellant under the Cy Pres Point in her main brief, points out that this doctrine is applicable only (1) when there is a valid charitable trust, (2) when the gift in such trust fails for reasons other than its validity, (3) only then after these first two conditions precedent are present does the court in order to save the charitable gift and give effect to decedent's intention search in the Will for a clear, general charitable intent, clearly discernible within the four corners of the instrument.

The trust in "Seventh" of the Will and it must follow in "Eleventh," was held by the Court below to fail. The Court did not in fact change this ruling in the order appealed from. The first precedent condition for an application of Cy Pres is missing and the question of the clear, general charitable intent is not even involved here.

But in any event Appellee errs in arguing that this Will does disclose a clear general charitable intent. He does not point to any language in the Will to support such contention.

A bare name such as the Custer County Society for the Preservation of Local Folklore Legend, History and Tradition standing alone as it does, in this Will, may fire the imagination as it seems to have that of Appellee by suggesting a project, but it creates no charitable trust nor does it express a charitable purpose.

Appellant has already made clear that the reason decedent wished such a society created was for the purpose of getting what she imaginatively called "the old homestead" rebuilt. That was the only way she could achieve this personal objective. Appellee admits on p. 8 "obviously the bequest is directed to the preservation of the specifically bequeathed property." But he fails to show how the specifically bequeathed picture of

the Borchardt family, all of Washington, D.C., - and "household tokens especially prized by the family" (Ex. A, "Eighth" of the Will) play a part in the folklore, legend and history of Montana.

Appellant finds nothing in Appellee's argument to sustain the purpose of his point. He fails to discuss specifically the language of the Borchardt Will but builds issues not present here, like straw men, and then attacks them.

He cites under this point two of the three cases he especially relies on. They appear not to be in point.

In Ould v. Washington Hospital for Foundlings, 95 U.S. 303 (1877), the testator sets forth clearly in his Will how the Hospital for Foundlings was to come into existence, - by act of Congress. Congress passed such an act. Testator left funds sufficient to carry out and maintain his purpose. That is not the case in the Borchardt Will. Testatrix had no intention herself to create the Custer County Society. Appellee does not point to any language in the Will here to show such an intent. His language concerning testatrix' intention at this point in his argument is all his own, without any reference to the Borchardt Will to support his contentions.

Noel et al v. Olds et al, 138 F. (2d) 581, (cited by Appellee as Knoll v. Olds), another case especially relied on by Appellee again has no resemblance to the Borchardt case and hence is not in point. The gift there was of $1,000,000 including manuscripts and art objects. In the Will there was provision for the perpetual maintenance and upkeep of a building to house the gift on the campus of Duke University. There was also a provision for continuing acquisition of additional objects of art.

Duke University refused the gift.

All conditions precedent to invoking Cy Pres were present there, and the Court finding in the Will a clear general, charitable intent of testator for the cause of art in the South, by invoking the doctrine of Cy Pres, named another Southern University to receive the gift.

Appellee himself is not convinced that Cy Pres is applicable, for in his closing paragraph on this point he anticipates that this Court may find that "the lower court's application of Cy Pres was not warranted," and offers the Court another solution, to find the trust in "Seventh" and "Eleventh" of the Will, which the Court below held failed, was instead valid. That becomes his Point II.

AS TO APPELLEE'S POINT II

"The Duties Conferred Upon Rivenes as Trustee By The Testatrix Are Substantial In Nature And The Argument of Appellant That The Trust Is Passive Is Not Substantiated By The Testamentary Instrument In Issue."

Appellant in her main brief on pps. 14 and 15 has analyzed why the trust in "Seventh" and "Eleventh" of the Will is passive, and for this reason is invalid.

Appellee attempts to find duties under the Will for the trustee in the purported trust, of "Seventh."

He argues on p. 12 that Rivenes had responsibility to supervise and care for the "furniture listed" which he was to hold in trust under "Seventh" of the Will. But "Seventh" of the Will states: "I direct that the furniture listed in the attached sheet be held in trust by David Rivenes of Miles City until the Custer County Society for the Preservation of Local Folklore, Legend, History and Tradition (hereinafter called the Society) has been established and is ready to start on the program of restoration of the county seat, with the reservation that during my lifetime, a life interest will remain vested in me." (Emphasis supplied.)

No list of furniture was attached to the Will. Appellee, too, points this out in his footnote on p. 12.

If there was no "attached sheet" then there was no testamentary gift of furniture at all to the pur-

ported Trustee under "Seventh." This was a specific testamentary gift which failed, for the reason that the furniture which was to pass under this paragraph was that on the "attached sheet," which in fact was not attached to the Will. Matter of Wright, 7 N.Y. 2d, 165 N.E. 2d 561 (1960). 365, 367-8./ This would be true even if "Seventh" were so structured as to be a valid trust. Appellee's whole contrived thought as to any duties in connection with the furniture therefore has no substance.

Appellee recites duties he invents and inserts them into the language of the Will as if they were present. For example on p. 12 he states, referring to paragraph "Eleventh" of testatrix' Will, that the purported trustee is "to take the sum realized from the sale of the property at 1741 Park Road, N.W. Washington, D.C. together with the rest, residue and remainder of the estate and hold them in trust until," - at this point Appellee inserts his own language, i.e. "such time as in his discretion the Society is prepared to restore the county seat." No such discretion is vested by testatrix in "Eleventh." That paragraph states after detailing the corpus of the gift, that it "be held in trust by David Rivenes until the Society has been established and is ready to start on the development of the program for the restoration of the county

seat as it was approximately in the early days of its history."

The fact that the purported trustee is just told "to hold," not even to pay over, completely negates any argument concerning a use of his discretion. While it may be implied by law that he must pay over when the conditions are met, as this purported trust is set up, even if it were a valid trust, which it is not, in order to have good title, the recipient of the gift would not be satisfied to receive it from the trustee who merely was directed "to hold," but would seek an order of the Court directing the trustee to pay over, in the absence of specific language in the trust. Such Court then would impliedly be called on to determine whether the necessary conditions were met, before directing the purported trustee to turn over the property, and so good title would be conveyed.

Such implied duties as proposed by Appellee with no basis in the Will are futile here to convert the passive trust in this Will into an active one. As stated, absent the list of furniture which testatrix states in "Seventh" is attached to the Will, no gift of furniture is given to the purported trustee to preserve. In "Eleventh" the trustee is not even directed to turn over, just "to hold," so he has no duty at all to in-

vestigate the status of the Society. It would not be his duty to apply to the Court for an order to pay over. The Society would be the party to initiate court proceedings for such an order. The Court would exercise the necessary discretion to determine the readiness of the Society to receive the gift. Appellee's point in the light of the structure of paragraphs "Seventh" and "Eleventh" of the Will has no merit. In any event as argued on p. 14 of Appellant's main brief, being a mere conduit to convey a gift is not sufficient to make a trust active.

Appellee cites Liberty National Bank of Washington v. Smoot et al, 135 F. Supp. 654, 659 D.C. D.C. 1955, as a case he especially relies on, but the facts there bear no resemblance to the Borchardt case.

In the Liberty National Bank case, at the time of his death the testator was sole owner of five parcels of real property and also owned an undivided one-third interest in a great number of other parcels of real property. These properties were in various states of repair. The executor was also trustee. That Will directed the executor-trustee to distribute to the beneficiaries, devises and legatees any property of any character of which the testator died the owner. This, the Court held, required the fiduciary in order to dispose of the prop-

erty, with the divided ownership, and the repair work going on, to undertake sufficiently active duties. He would have to take title to real estate and proceed with its distribution as the Will there directed. No real estate is involved in the Borchardt case, and no such duties are required of the purported trustee under "Seventh" and "Eleventh" of the Will herein.

On p. 14 Appellee himself states the applicable law of this case that "the automatic function of receiving for the cestui que trust, and merely paying over to him the trust fund or its income, will not make a trust active . . ."

In Betker v. Nally et al., 140 F. 2d 171, 173, Associate Justice Miller said: "It is not necessary for us to determine what effect this - - - testamentary purpose might have had if the deed had been otherwise drawn, if it had vested substantial powers in the trustees."

The Borchardt Will vested no powers in the purported trustee, and the Court below on December 4, 1969 held correctly that the purported trust failed.

AS TO POINT III

"Barn Players,Inc. is Capable of Accepting a Charitable Trust Under The Doctrine of Cy Pres."

Barn Players, Inc. has never been a party in this case. It is a private social club for members, organized in Montana. Its name comes into the case for the first time when in the order appealed from, the Court below after invoking cy pres "to validate" the testamentary trust it previously held had failed, itself selected it as the cestui que trust in place of the cestui named by decedent, which it held was non-existent.

Appellant suggests in these circumstances that Barn Players, Inc. has no standing before this Appellate Court.

In any event that corporation is not qualified to receive the gift under the Will even if the purported trust were valid. (See Appellant's main brief, Point II, p. 21).

Appellee on p. 18 of his brief sets forth attributes of Barn Players, Inc. to show their qualifications to undertake "renovation of testatrix' father's home and the county seat."

Appellee obviously rejects the fact that testatrix did not intend her funds to restore anything. He also overlooks here that testatrix' father's home was not

in existence and could not be renovated. Rivenes stated in the "addendum information" it had to be rebuilt, then testatrix would furnish it. As to Appellee's assurance that Barn Players, Inc. would restore the county seat, Appellant suggests such a restoration is not within the province of any private corporation.

Finally, Appellee again suggests an alternative to this Court if it decides the lower Court erred in using cy pres, that "the intent of the testatrix can still be validly performed through the trustee Rivenes."

Appellee does not elaborate on this suggestion. He ignores the fact that if this Court decides that the Court below correctly held that the purported trust in the Will failed, then Rivenes is not a trustee. Testatrix left no gift to Rivenes personally, only as a trustee. Appellee does not state how this gift would be supervised, to whom a purported trustee would account for his stewardship, precisely what he was expected to do - the testatrix merely asked him "to hold in trust until." He does not refer to the Will and state what intentions of the testatrix are clearly set forth there for Rivenes to carry out.

Appellant submits that there is no legal sanction or testamentary basis for such a suggestion.

CONCLUSION

Appellant prays this Court to reverse the decision of the Court below and to hold that the trust in "Seventh" and "Eleventh" of the Will failed, that the cestui que trust named by testatrix was not in being at the time of death, that the doctrine of cy pres is not applicable to this case, and that title to the corpus of the purported trusts has vested in decedent's heirs-at-law.

Respectfully submitted,

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